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IN THE

# Supreme Court of the United States

October Term, 1967

No. [illegible]

GOLDLAWR, INC.,

*Petitioner*,

v.

MARCUS HEIMAN, SUE COE OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

*Respondents*.

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**Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, in Opposition to Petition for a Writ of Certiorari**

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IN THE

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OCTOBER TERM, 1960

No. 981

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GOLDLAWR, INC.,

*Petitioner,*

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

*Respondents.*

---

## Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, in Opposition to Petition for a Writ of Certiorari

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### Preliminary Statement

Petitioner, plaintiff below, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed the order dated January 27, 1960 of the United States District Court for the Southern District of New York.[1] Said order (1) dismissed the complaints below as to the corporate defendants, Select Operating Corporation and United Booking Office, Inc., for lack of jurisdiction over the person of said

[1] The opinion of the Court of Appeals is officially reported at 288 F. 2d 579 (advance sheets May 26, 1961).

corporate defendants, and (2) dismissed the complaints as to Marcus Heiman for lack of jurisdiction over his person and denied the motions of plaintiff to substitute the executors of the Estate of Marcus Heiman, deceased, as party defendants in place of Marcus Heiman (See pp. 71a 72a of appellant's appendix in the Second Circuit).[2]

The affirmance by the Court of Appeals for the Second Circuit as to respondent Marcus Heiman was unanimous. *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 587.[3]

The question presented for review by petitioner, namely—

> "Whether the District Court for the Eastern District of Pennsylvania * * * had the power to transfer the case for improper venue under 28 U. S. C. §1406(a) without having obtained personal jurisdiction over the transferred respondents?" (petitioner's brief, pp. 2-3),

does not bring up for review the propriety of the affirmance as to Marcus Heiman. The position of respondent Marcus Heiman on this application is different from that of the two corporate respondents.

[2] The order was filed jointly in two civil actions, Nos. 244 243 and 244 243 U. S. D. C. S. D. N. Y. entitled "Goldlawr, Inc., Plaintiff v. Milton Shubert, William Klein, Sylvia W. Golde, Marcus Heiman, Select Operating Corporation and United Booking Office, Inc., Defendants."

[3] The Court of Appeals for the Second Circuit had originally dismissed the appeal taken from the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure *Goldlawr, Inc.* v *Heiman*, 273 F. 2d 729; but on rehearing permitted the District Court to "enter a fresh decree" for an appeal pursuant to 28 U. S. C. §1292(b) *Goldlawr* v *Heiman*, 275 F. 2d 729, 731.

## Statement of the Case

Marcus Heiman died a resident and domiciliary of New York, New York, on September 9, 1957, almost eleven months after the first complaint was filed (C. A. No. 22092, U. S. D. C., E. D. Pa.; 144-243, S. D. N. Y.) The Morgan Guaranty Trust Company of New York and Asher Levy were issued letters testamentary by the Surrogate's Court of the State of New York on October 1, 1957.[4]

On March 3, 1959, the date the United States District Court for the Eastern District of Pennsylvania ordered the actions transferred to the Southern District of New York, Marcus Heiman had been dead some fifteen months; he had not been personally served with process; the District Court had held that Marcus Heiman neither was found nor had an agent in Pennsylvania and had held venue there improper as to him (*Goldlawr, Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682; petitioner's appendix B, pp. 20a-23a); Marcus Heiman had not waived lack of jurisdiction over his person or improper venue; ***his executors had not been substituted as party defendants;*** there had been no appearance by the Estate of Marcus Heiman; the estate had not received any legal notice of the pendency of the actions; there was no one before the District Court at the date of transfer authorized to represent the deceased, Marcus Heiman, or his estate.

The Marshal's returns of service in the United States District Court for the Eastern District of Pennsylvania for Marcus Heiman in each of the actions stated in substance that service had been made upon Marcus Heiman by leaving a copy of the summons and complaint with a

[4] By an intermediate decree of the Surrogate's Court dated June 18, 1960, Asher Levy was permitted to resign and Morgan Guaranty Trust Company of New York was appointed sole Executor of the Estate of Marcus Heiman.

woman in charge of an office at 209 Quince Street, Philadelphia, Pennsylvania, and that service had been made in that manner on the advice of plaintiff's attorney (R. 18, 501).[3]

Plaintiff's attorney knew Marcus Heiman could only be served within the Southern District of New York. At the time that plaintiff's attorney directed service on Marcus Heiman in the foregoing manner, he directed the Marshal in New York to serve the defendant United Booking Office, Inc., of which Marcus Heiman was president and a director, by serving Marcus Heiman at his business "236 West 44th Street" or at his home "24 West 55th Street", New York, New York. (See Exhibit B-1 to affidavit of Harold E. Kohn, Esq., sworn to June 17, 1959, at R. 217, 226, 736, 745, printed at p. 18b of the appendix of the executors of the Estate of Marcus Heiman in the Court of Appeals for the Second Circuit.)

After the returns of service as aforesaid, Marcus Heiman and other defendants in each of the actions moved to quash the respective returns of service and to dismiss the actions for lack of jurisdiction over their persons and for improper venue.

In opposing these motions petitioner made no effort whatsoever to sustain the service upon Marcus Heiman or to sustain Philadelphia as a proper venue as to him. Petitioner filed a 32 page affidavit, a 12 page brief and offered voluminous evidence and documents in opposition to the motions. Not one word was offered by petitioner to support the venue as to Marcus Heiman or the service upon him (R. 190).

Marcus Heiman died after argument of these motions but prior to their decision. Petitioner was officially in-

[3] Refers to pages of Record on Appeal in the Court of Appeals for the Second Circuit.

formed of the death of Marcus Heiman in January, 1958. Nonetheless, petitioner took no action to substitute the executors as party defendants or to inform the Court (R. 234).

On December 22, 1958, Judge Kraft filed an opinion in both actions sustaining the motions of Marcus Heiman to dismiss for improper venue. *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677, 679-682. Judge Kraft did not pass upon the motion to dismiss for lack of jurisdiction over the person of Marcus Heiman presumably because he was prepared to dismiss for lack of improper venue. When Judge Kraft reversed his opinion and ordered transfer instead of dismissal, he continued to disregard the motion to dismiss for lack of jurisdiction over the person. Petitioner has conceded that jurisdiction over the person of Marcus Heiman has never been acquired. *Goldlawr, Inc. v. Heiman*, 288 F. 2d 579, 582.[6]

After transfer to New York, petitioner served upon the executors notices of motion dated May 11, 1959 to substitute them as party defendants in place of Marcus Heiman (petitioner's appendix in Second Circuit, p. 62a). For the first time since the death of Marcus Heiman, some eighteen months prior thereto, the estate was given legal notice of the pendency of these actions against Marcus Heiman. Until the applications to substitute the executors were made before the United States District Court for the Southern District of New York, no papers of any name, nature or description had been served or filed upon the estate. A formal claim had not even been filed in connection with the proceedings before the Surrogate's Court. After service of the notices of motion for substitution, the executors appeared in the District Court

[6] Plaintiff in fact admitted service would have to be effected in New York after transfer. See Exhibit C, at page 14b of appendix of Select Operating Corporation *et al.* in the Second Circuit.

for the Southern District of New York to oppose them and to cross move for the dismissal of the actions. (See pp. 1b-3b of appendix of executors in the Second Circuit.)

The dismissal by the District Court for the Southern District of New York (*Goldlawr, Inc.*, v. *Heiman*, 175 F. Supp. 793) did not terminate petitioner's rights or preclude him from his day in court. The original actions are still pending in the United States District Court for the Eastern District of Pennsylvania against Jacob Shubert, Lawrence Shubert Lawrence, John Shubert, Select Theatres Corporation, Modern Theatre Corporation, Barrymore Theatre Corporation and L. A. B. Amusement Corporation.[7] The transferred actions are still pending in the United States District Court for the Southern District of New York as to three defendants: Milton Shubert, William Klein and Sylvia W. Golde. (See *Goldlawr Inc.* v. *Shubert*, 25 F. R. D. 276, S. D. N. Y. 1960.) Immediately after the dismissal below as to the respondents, petitioner instituted a new action on August 20, 1959, naming as defendants the Executors of the Estate of Marcus Heiman and the two corporate respondents (C. A. 149 349 S. D. N. Y.).[8] This third action seeks $2,150,000.00 treble damages of which $1,050,000.00 is sought from the Estate of Marcus Heiman for the period August 20, 1955 to September 9, 1957 (the date of death). Issue has been joined in this latter action.

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[7] According to petitioner's own statement, Jacob Shubert is the principal defendant in all of these actions. In its brief in support of its petition at page 4, petitioner states: "This is a private antitrust action brought * * * against Jacob Shubert and several other persons and corporations identified with the Shubert interests * * *."

[8] Plaintiff, upon being alerted by the motions of Marcus Heiman to quash service and to dismiss etc. could have protected its rights by starting an action in 1956 against Marcus Heiman during his lifetime in the Southern District of New York; instead plaintiff chose to wait three years.

## Argument

Although petitioner appealed to the Court of Appeals from both the dismissal of the actions as to Marcus Heiman and from the denial of the motions for substitution, and although petitioner advanced below several arguments to sustain transfer as to Marcus Heiman and to justify substitution of his executors as party defendants at such late date, on this application petitioner (1) has limited its request for review to a single question having no effective bearing on the issue of transfer with respect to Marcus Heiman specifically and having no bearing on the issue of substitution of his executors as party defendants; and (2) has limited its argument to seeking a review of the propriety of the transfer with respect to the corporate respondents only.

In opposing the present petition for certiorari, Morgan Guaranty Trust Company of New York on behalf of respondent, Marcus Heiman, respectfully urges the following points:

1. No substantial or important question as to Marcus Heiman is presented for review; the Court of Appeals for the Second Circuit was unanimous in affirming the order below as to him;

2. Petitioner has acquiesced in the affirmance as to Marcus Heiman. The question presented for review is moot as to him. A review as to Marcus Heiman would be wholly ineffectual for lack of a proper party on whom even a reversal might operate;

3. The judgment of the Court of Appeals sought to be reviewed is not such a final judgment and the issues involved as to Marcus Heiman are not of such

fundamental importance as to warrant a review by the Court;

4. There is no real conflict of decisions among the several circuits; any disagreement existing prior hereto has been resolved by the decision below of the Court of Appeals for the Second Circuit by it having explained its earlier decision of *Schiller v. Mit-Clip Co., Inc.*, 180 F. 2d 654.

## POINT I

**No substantial or important question as to Marcus Heiman is presented for review. The Court of Appeals for the Second Circuit was unanimous in affirming the order below as to him.**

Judge Hincks of the Court of Appeals began his dissent as follows:

> "I agree with my brothers that the order below as to Heiman should be affirmed."
>
> *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 587.*

Judge Palmieri in dismissing the actions as to Marcus Heiman and in denying the motions of plaintiff for substitution of the executors wrote:

> "Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

* The balance of his opinion is directed to the issues as they affect the corporate respondents only

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr* v. *Shubert*, 169 F. Supp. 677, 682 (1958) See Clayton Act §4, 38 Stat. 731 (1914), 15 U. S. C. §15 (1958). He was never (1914), 15 U. S. C. §15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. §1406(a) would alone impel this Court to grant the cross-motion to dismiss.

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States* v. *Field* 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1850), Note on Revivor, 14 Fed. 392 (1882); cf. *Carnes* v. *Strait*, 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action."

*Goldlawr, Inc.* v. *Shubert*, 175 F. Supp. 793, 797-798.

Petitioner first moved to substitute the Executors of the Estate of Marcus Heiman as party defendants *only after* transfer to the Southern District of New York. At the time of transfer there was no party to the actions upon whom service with respect to Marcus Heiman could be effected within the jurisdiction either of the Eastern District of Pennsylvania or the Southern District of New

York. Amenability of process in at least the transferee district has always been held a condition precedent to a proper transfer. See and "cf" *Hoffman* v. *Blaski*, 363 U. S. 335, 341-342; *Foster-Milburn* v. *Knight*, 181 F. 2d 949, 951-952 (2nd Cir., 1950). Only the executors of the Estate of Marcus Heiman were amenable to process in the Southern District of New York, but at the time of transfer they were not parties to the action.

Not only was there no party in the Southern District of New York at the time of transfer capable of being served with process as to Marcus Heiman, but also no valid and effective order of transfer could be entered as to a deceased party whose personal representatives had not been brought before the Court. The District Court in the Eastern District of Pennsylvania did not have the power to transfer the actions until they were revived and continued by the proper substitution of the Executors. *Ex Parte Slater*, 246 U. S. 128, 133,; *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (U. S. 1838); 1 C. J. S., Abatement and Revival, §161, p. 213 (1936); 1 AM. JUR., Abatement and Revival, §159, p. 105 (1936).

These foregoing rules of law being fundamental, not in dispute, and having been applied by this Court, raise no substantial or important issue to be reviewed. Petitioner concedes this by virtue of its not having advanced on this application, any argument in this regard. Review as to Marcus Heiman should be denied.

## POINT II

**Petitioner has acquiesced in the affirmance as to Marcus Heiman. The question presented for review is moot as to him. A review as to Marcus Heiman would be wholly ineffectual for lack of a proper party upon whom even a reversal might operate.**

As to respondent Marcus Heiman the court below (i) dismissed for lack of jurisdiction over his person and (ii) held "that the Executors could not be substituted pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure". (Petitioner's brief, p. 5, note "2".)

Petitioner does not seek to review any question with respect to the denial of substitution and does not seek to review whether the United States District Court for the Eastern District of Pennsylvania could validly transfer an action as to a decedent who was not before the court and whose personal representatives had not been substituted prior to the transfer. Petitioner advances no arguments in respect thereto and has accordingly acquiesced in the affirmance as to Marcus Heiman. Petitioner limits this application for review to the propriety of the transfer as to the corporate respondents only. Under these circumstances, the question presented for review is moot as to respondent Marcus Heiman.

> "* * * the duty of this Court * * * 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"

*Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 367;
*Mills* v. *Green*, 159 U. S. 651, 653.

See and "cf." *Corer* v. *Schwartz*, 133 F. 2d 541 (2nd Cir. 1942), cert. den. 319 U. S. 748.

The petitioner no longer seeks to substitute the Executors of the deceased, Marcus Heiman; nor should this Court exercise its discretion to review the issue inasmuch as it is not specifically assigned as error in the petition for certiorari. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48; see and "cf." *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183. Accordingly, even if this Court answered in the affirmative the specific question sought to be reviewed by petitioner, there would be no party with respect to Marcus Heiman upon whom a reversal could be effectual. The issue is moot as to Marcus Heiman.[10]

To compel the Estate of Marcus Heiman to proceed further with this appeal where the petitioner has acquiesced in the affirmance and does not present for review any specific questions with respect to Marcus Heiman would work a manifest prejudice to the estate and would be disruptive of its administration. There is pending below a third action brought by petitioner against the estate seeking from it $1,050,000.00 treble damages. Thus, no prejudice can result to the petitioner by denying certiorari and limiting petitioner to the prosecution of this action pending below. Review should be denied.

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[10] It is doubtful whether at this late date—some 5 years and 9 months after the death of Marcus Heiman, this Court could properly permit substitution of the executor as a party defendant. See *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486; F. R. C. P. 25(a).

## POINT III

**The judgment of the Court of Appeals sought to be reviewed is not such a final judgment and the issues involved as to Marcus Heiman are not of such fundamental importance as to warrant a review by the Court.**

The Court of Appeals for the Second Circuit held that the order of dismissal of the United States District Court for the Southern District of New York as to the respondents did not have the finality to give it appellate jurisdiction. *Goodman, Inc. v. Heiman*, 273 F. 2d 729.[11] The Court of Appeals originally refused to accept appellate jurisdiction because the complaints at bar alleged only a single claim involving multiple parties and the order of the District Court dismissed the action only as to some but not as to all of the parties.[12]

Petitioner filed these actions seeking treble damages for alleged injury resulting from an alleged single conspiracy in violation of the Sherman Antitrust Act, 15 U. S. C. 1 and 2. The complaints as amended, are identical. Civil Action No. 144 241 was originally filed in the United States District Court for the Eastern District of Pennsylvania on October 17, 1956 as Civil Action No. 21506. The companion action, Civil Action No. 144 243, was originally filed on February 18, 1957 in the Eastern District of Pennsylvania as Civil Action No. 22092. Both these actions are still pending in the United States District Court for the Eastern District of Pennsylvania as to seven defendants with respect to whom the actions had not been transferred. The transferred actions (Civil Ac-

[11] The order dated April 12, 1961 of this Court amending Rule 54(b) of the F. R. C. P. recognizes the order below was not final.

[12] Among whom is Isaac Shirtz the principal defendant. See n. 7, *supra*.

tion Nos. 144 243 and 144 244) are likewise still pending in the District Court for the Southern District of New York as to the defendants, Milton Shubert, William Klein and Sylvia W. Golde.

After dismissal as to the respondents at bar, petitioner instituted a third action in the United States District Court for the Southern District of New York naming the present corporate respondents and the executors of the Estate of Marcus Heiman as defendants. This third action and the actions below pending against the aforementioned three other defendants have been consolidated for purposes of trial.

This Court should refuse to entertain the present application as it is not such a final judgment involving issues of such fundamental and extraordinary importance to the respondent Marcus Heiman to warrant a review. Petitioner will not be prejudiced if review is denied. Petitioner will still have its actions in Philadelphia against the principal defendants, including Jacob Shubert. It will still have the actions below as to Milton Shubert, William Klein and Sylvia W. Golde and Civil Action 144 349 with respect to the respondents at bar.

That this Court has power to review a non-final judgment in a proper case is unquestioned. But this Court has said:

> As has been many times declared, this review of a non-final judgment is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * and, except in extraordinary cases, the writ is not issued until final decree * * * .

*Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258.

The issues with respect to Marcus Heiman are not so extraordinary and of peculiar gravity to justify review. That a court does not have power to proceed against a party who has died, who was never personally served with process during his lifetime, and whose personal representatives had not been substituted and brought before the Court is not such an extraordinary proposition of law that should be reviewed under the circumstances presented at bar. (Point I, *supra*). Here where several actions all arising from the same litigation are still pending below and where petitioner will not be precluded from his day in court, this Court should refuse to entertain the present application. Any prejudice claimed by petitioner by virtue of having its damage period reduced is a result of petitioner's own folly and bad faith in originally instituting these actions in 1956 as to Marcus Heiman in the United States District Court for the Eastern District of Pennsylvania when it knew it could have originally acquired jurisdiction over Marcus Heiman and many of the other defendants by instituting this action in the United States District Court for the Southern District of New York.[12] Instead of having five different actions pending from the same litigation as is the case currently, petitioner would have had at the most only two. Review should be denied.

[12] See also n. 8, *supra*, p. 6.

## POINT IV

**There is no real conflict of decisions among the several Circuits; any disagreement existing prior hereto has been resolved by the decision below of the Court of Appeals for the Second Circuit by it having explained its earlier decision of *Schiller* v. *Mit-Clip Co., Inc.*, 180 F. 2d 654.**

The Court of Appeals for the Second and Third Circuits are in agreement that transfer without jurisdiction over the person of a defendant is invalid. *Hohensee* v. *News Syndicate, Inc.*, 3 Cir., 286 F. 2d 527; *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 288 F. 2d 579.[14]

The opinions of the Court of Appeals for the District of Columbia and for the Fourth Circuit on their face indicate disagreement with the foregoing. See *Amerio Contact Plate Freezers, Inc.* v. *Knowles*, 274 F. 2d 590 (D. C. 1960); *Hayes* v. *Livermont*, 279 F. 2d 818 (D. C. 1960); *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514 (4th Cir. 1955). *However, no real conflict exists.* The Court of Appeals for the District of Columbia in holding that personal jurisdiction was not necessary relied primarily on the opinion of the Court of Appeals for the Second

[14] The Court of Appeals for the First Circuit has indicated its agreement. In *In re Josephson*, 1 Cir., 218 F. 2d 174 at 185, the Court of Appeals stated that transfer would be improper, i.e., "not in the interest of justice" if a District Court ought to transfer an action without personal jurisdiction over the defendant. Such jurisdiction had been acquired in the transferor court. "Several District Courts prior to the opinions of the Court of Appeals held that personal jurisdiction was necessary." See *McDonald* v. *Dotman*, 165 F. Supp. 943 (W. D. Ky. 1958); *Bishop* v. *Kansas City Southern Railway Co.*, 161 F. Supp. 50 (W. D. Mo. 1958); *Engel* v. *Beaver Lumber Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950); *Bergen* v. *Louisville & Nashville Railroad Co.*, 154 F. Supp. 681 (W. D. Pa. 1957).

Circuit in *Schiller* v. *Mit Clip Co.*, *supra*, and upon other decisions stemming from it. (See n. 15, *infra*.)

Both Judge Moore for the majority and Judge Hincks in his partial dissent recognized that reliance on the opinion of the Court of Appeals in *Schiller* v. *Mit Clip Co.*, *supra*, was misplaced. Judge Moore at 288 F. 2d 579, 584, wrote:

> "The cases, directing transfer under section 1406(a) despite a lack of personal jurisdiction over the defendant, indicate that the view that the section authorizes transfer even in the absence of personal jurisdiction over the defendant had its *genesis in a misconception of the holding of this Court in Schiller* v. *Mit-Clip Co.*, 2 Cir., 1950, 180 F. 2d 654 • • •. The *unwarranted* construction of the statute based on *Schiller* has gained currency by virtue of repetition." (Emphasis added.)

Judge Hincks at 288 F. 2d 579, 587, footnote "1" stated:

> "I [do] agree with the Judge below and with my brothers that the decision of this Court in *Schiller* v. *Mit Clip*, 180 F. 2d 654, does not speak to the precise question now raised although other case have given Schiller a more expansive reading • • •"

That the Court of Appeals for the District of Columbia relied on the *Schiller* case cannot be doubted. The Court wrote:

> "The Court's lack of jurisdiction over the person of the defendant is immaterial. *Schiller* v. *Mit-Clip Co., Inc.*, 2 Cir. 180 F. 2d 654; *Internatio-*

*Rotterdam, Inc.* v. *Thomsen*, 4th Cir., 218 F. 2d 514; *Orion Shopping & Trading Co.* v. *United States*, 9 Cir. 247 F. 2d 755, *United States* v. *Welch*, D. C. 151 F. Supp. 899; *Petroleum Financial Corp* v. *Stone*, D. C. 116 F. Supp. 426."

*Amerio Contact Plate Freezers, Inc.* v. *Knowles*, 274 F. 2d 590, 591.[15]

The case of *Internatio-Rotterdam, Inc.* v. *Thomsen*, *supra*, is an admiralty decision which likewise may not be relied upon. This Court has only recently recognized that a distinction is to be made between civil actions such as the action at bar and cases brought in admiralty. See and "Cf." *Hoffman* v. *Blaski*, 363 U. S. 335 (1960), and *Continental Grain Co.* v. *Barge*, FBL—585, 364 U. S. 19, 21-22 (1960). The reasons underlying the different treatment of transfers in civil actions and admiralty cases were recognized by this Court therein. Furthermore, the difficulty of acquiring jurisdiction over a defendant whose ship may be located on the high seas for a period extended by the Statute of Limitations justifies the distinction.[16]

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[15] Note that *United States* v. *Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957) relied on the *Schiller* case. *Petroleum Financial Corp* v. *Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953) relied likewise on the *Schiller* case, although the District Court had "serious doubts upon the matter" (pp. 427, 429); *Orion Shipping & Trading Company* v. *United States*, 247 F. 2d 755, (9th Cir. 1957) is an admiralty decision which is patently inapplicable because the transferor court had personal jurisdiction over the defendant (see concurring opinion, page 758). Furthermore, appellee in the *Amerio Contact* case conceded in its brief that appellant's reliance on the *Schiller* case was correct but argued that transfer was improper because the court had not obtained jurisdiction over the subject matter. (Appellee's brief on appeal to the Court of Appeals for the District of Columbia, No. 15,150, pp. 12-13, 15.)

[16] See Note 68 Harv. L. Rev. 1069 (1955).

Accordingly it must be assumed that the Court of Appeals for the District of Columbia will no longer apply the reasoning of *Amerio Contact Plate Freezers, Inc. v. Knowles*, *supra*, inasmuch as it misconstrued the *Schiller* case and also improperly relied upon decisions in admiralty.[17] At least until such time that the Court of Appeals for the District of Columbia or of another Circuit expresses disagreement with the decisions of the Second and Third Circuits, no real conflict among the Circuits can presently be said to exist. For the foregoing reasons the petition at bar presents no question concerning the operation of the Federal judicial system requiring review. The petition should be denied.

## CONCLUSION

**The petition for certiorari to the Court of Appeals for the Second Circuit should be denied.**

Respectfully submitted,

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[17] The decision in *Hayes v. Vermont*, 179 F. Supp. 818 (D. C. 1960) relies upon the Court's earlier decision in *Amerio Contact Plate Freezers, Inc.*, *supra* and on *Pocahontas Kolbed Fuel Inc. v. Thomson*, *supra* note Judge Bazelon in a concurrence relied solely on the *Amerio Contact Plate Freezers* decision. Accordingly the *Hayes* decision suffers from the same infirmities as the *Amerio Contact Plate Freezers* decision.